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Nos. 78-382 and 78-390

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARK M. STREETER, PETITIONER

v.

UNITED STATES OF AMERICA

VANCE C. DYAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-46)[1] is reported at 574 F.2d 1385.

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[1] "Pet. App." refers to the appendix to the petition in No. 78-382.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1978 (Pet. App. 47-48). Petitions for rehearing were denied on August 9, 1978 (Pet. App. 49). The petition for a writ of certiorari in No. 78-382 was filed on September 5, 1978, and in No. 78-390 on September 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions for violating two conspiracy statutes, where the government's proof showed only one agreement to engage in conspiracy, violated double jeopardy.

2. Whether the evidence was sufficient to support petitioner Streeter's convictions.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of conspiring to import marijuana, in violation of 21 U.S.C. 952(a) and 963 (Count I), and conspiring to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846 (Count II).[2] Streeter was sentenced to the maximum punishment authorized by law on each count, subject to modification under 18 U.S.C. 4205(c), the

[2] Co-defendant Clement DeMatto was also convicted on both conspiracy counts, but his convictions were reversed by the court of appeals (Pet. App. 47-48).

sentences to be served concurrently.[3] Dyar was sentenced to concurrent terms of four years' imprisonment and two years' special parole on each count. The court of appeals affirmed (Pet. App. 21-46).

The evidence adduced at trial, as set forth by the court below (Pet. App. 27-33), showed that in August 1975, petitioner Dyar telephoned Robert Fleming (who became a government witness) in Florida to ascertain whether Fleming would pilot airplanes transporting music groups and their equipment. The next day Fleming flew to Memphis, where he was met at the airport by Dyar and Streeter and taken to a motel. There Fleming discussed with Dyar and Gary Pagels (another co-conspirator) the possibility of organizing a company to transport music groups and hunting expeditions. Soon, the discussion turned to the subject of importing a shipment of marijuana from Colombia, South America. Fleming agreed to join the operation. During the marijuana discussions Streeter was in and out of the room.

After leasing the necessary aircraft and eventually assuring its airworthiness, Fleming and co-pilot Neal Perks flew to Colombia. A day and a half later, they returned to Florida, but no evidence was offered as to whether they brought back any marijuana.

Two days passed and then Fleming's wife telephoned him at work to inform him that police officers

[3] No final sentence has yet been imposed, Streeter having elected not to begin serving his sentence. See *Corey* v. *United States*, 375 U.S. 169, 174-175 n.15 (1963).

were on their way to arrest him. Fleming notified Pagels of his impending arrest. After making bond, Fleming again spoke to Pagels and was told that Streeter would fly to Orlando to discuss future strategy. When Streeter arrived he asked Fleming to outline what he had told the police so that "we can get our stories together" (Tr. 102). After Fleming related the story he had given the police, Streeter replied, "Okay. That is the story we will go with" (Tr. 103).

ARGUMENT

1. Petitioners contend that it was improper to convict them of conspiring to import marijuana and also of conspiring to possess marijuana with intent to distribute when the government proved only a single conspiratorial agreement (78-382 Pet. 9-10; 78-390 Pet. 8-9).

As petitioner Dyar correctly points out (78-390 Pet. 9-10), the courts of appeals are in conflict on this issue. Two circuits agree with petitioners that evidence showing only one agreement to commit related offenses cannot sustain two convictions under different conspiracy statutes. *United States* v. *Rivera Diaz*, 538 F.2d 461 (1st Cir. 1976); *United States* v. *Honneus*, 508 F.2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975); *United States* v. *Adcock*, 487 F.2d 637 (6th Cir. 1973). These circuits rely, as do petitioners, on *Braverman* v. *United States*, 317 U.S. 49 (1942), where this Court held that one agreement to commit several unlawful acts did not amount to

several conspiracies under the general conspiracy statute (now 18 U.S.C. 371), because "[t]he single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute [Section 371]" (317 U.S. at 54).

Three other circuits, on the other hand, have held that a single agreement may be punished under both Sections 963 and 846. *United States* v. *Warholic*, No. 76-1206 (9th Cir. Dec. 10, 1976) (unpublished), cert. denied, 431 U.S. 905 (1977); *United States* v. *Arteaga-Limones*, 529 F.2d 1183, 1194 (5th Cir.), cert. denied, 429 U.S. 920 (1976); *United States* v. *Houltin*, 525 F.2d 943, 950-951 (5th Cir. 1976), vacated and remanded, 429 U.S. 1034 (1977); *United States* v. *Marotta*, 518 F.2d 681, 684-685 (9th Cir. 1975); *United States* v. *James*, 494 F.2d 1007, 1025-1026 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974). These decisions rely on *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946). In that case the defendants were convicted of conspiracy to restrain trade, in violation of Section 1 of the Sherman Act, and conspiracy to monopolize, in violation of Section 2, and the Court rejected the argument that *Braverman* barred two convictions for what defendants claimed was "but one conspiracy, namely, a conspiracy to fix prices" (328 U.S. at 788). It was held that a single agreement with several unlawful objects might amount to more than one conspiracy if different elements of the agreement violate different conspiracy statutes: "In contrast to the single conspiracy described in [*Braverman*] in separate counts, all charged under the general con-

spiracy statute [18 U.S.C. 371], we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by § 1 and the other by § 2 of the Sherman Act" (*ibid.*).

In our view, the court below—like the courts of appeals for the Ninth and District of Columbia Circuits—is correct in reading *American Tobacco* as controlling in the present situation. But, in any event, this case is not an appropriate vehicle for resolving the conflict among the circuits. Because both petitioners received concurrent prison and parole sentences,[4] the propriety of their conviction on both counts is of academic interest only. In these circumstances, we submit it would be appropriate for the Court to apply the concurrent sentence doctrine and decline to reach petitioners' claims. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).[5]

[4] We assume that, following the study provided for in 18 U.S.C. 4205(c), petitioner Streeter will receive the same sentence on both counts and that the sentences will remain fully concurrent. That result is indicated both by the present tentative sentence and by the district court's treatment of petitioner Dyar.

[5] Invocation of the concurrent sentence doctrine under these circumstances would not conflict with our response in *Rubin* v. *United States*, vacated and remanded, No. 77-792 (Oct. 2, 1978). In *Rubin*, we concluded that the court of appeals improperly utilized the concurrent sentence doctrine because petitioner's claims related to his guilt or innocence on the unreviewed convictions and it was readily apparent that the unreviewed convictions probably would adversely affect petitioner's chances of early parole. That is not the present case. Here, petitioner's double jeopardy claim is unrelated to their guilt or innocence: they do not controvert the evidence of the conduct that formed the basis of their convictions. The fact that two convictions are recorded for their conduct established at trial will not have a practical effect on their term of incarceration. As noted in our response in *Rubin*, the Parole Commission, in assigning an offense severity rating, looks to the actual conduct underlying the offense or offenses, not to the statutory definition of the offense or the number of separate charges.

2. Petitioner Streeter's additional contention (78-382 Pet. 15-20) that the evidence was insufficient to establish his complicity in the conspiracy prior to its termination is without merit. As the court of appeals pointed out (Pet. App. 39-40), Streeter's presence during portions of the discussions concerning the marijuana shipment, coupled with the evidence of his trip to Orlando to interview Fleming following his arrest, clearly supports the inference that Streeter was a knowing participant in the conspiracy.

Petitioner Streeter argues that the fact of his trip to Orlando and the statements he made during his talk with Fleming on that occasion are irrelevant because these events occurred after the conspiracy had terminated. But Streeter's conduct and statements were, in effect, admissions of his own illegal conduct, not statements of co-conspirators. The situation is thus unlike *United States* v. *Killian*, 524 F.2d 1268 (5th Cir. 1975), certiorari denied, 425 U.S. 935

(1976), upon which Streeter relies. Accordingly, even though made subsequent to the termination of the conspiracy, Streeter's admissions were relevant to his prior complicity.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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